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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

FLORENCE L. KAUBISCH; LESTER F. HALL AND ARADEN J. HALL TRUSTS; ROY SCHIEFER AND BETTY SCHIEFER, HUSBAND AND WIFE; AND WILLIAM AND INA MAE OERLLINE, HUSBAND AND WIFE,

Petitioners,

v.

STATE OF SOUTH DAKOTA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER 43 U.S.C. § 912 APPLIES TO RIGHTS-OF-WAY GRANTED UNDER THE GENERAL RIGHT-OF-WAY ACT OF 1875 (43 U.S.C. § 934) AND TO THE REVERSIONARY RIGHTS OF THE PETITIONERS.

II

WHETHER AUTHORITY TO ABANDON A RAILROAD RIGHT-OF-WAY GRANTED BY THE INTERSTATE COMMERCE COMMISSION CONSTITUTES AN ACT OF CONGRESS UNDER 43 U.S.C. § 912.

III

WHETHER THE UNITED STATES, FOR PURPOSES OF 43 U.S.C. § 912, POSSESSES ANY "RIGHT, TITLE, INTEREST, AND ESTATE" IN LANDS OVER WHICH A RIGHT-OF-WAY HAS BEEN GRANTED UNDER THE GENERAL RIGHT-OF-WAY ACT OF 1875 WHEN THE UNITED STATES, SUBSEQUENT TO THE RIGHT-OF-WAY GRANT, HAS CONVEYED, WITHOUT RESERVATION, FEE TITLE TO THE UNDERLYING LAND.

IV

WHETHER A RECREATIONAL BICYCLE TRAIL CONSTITUTES A PUBLIC HIGHWAY FOR PURPOSES OF 43 U.S.C. § 912.

PARTIES TO THE PROCEEDINGS IN THE SOUTH DAKOTA SUPREME COURT

Petitioners, Florence L. Kaubisch, Lester F. Hall and Araden J. Hall Trust, Roy and Betty Schiefer, and William and Ina Mae Oerlline, have been parties in this case from its beginning. Respondent, State of South Dakota, joined the case after its commencement as an intervening Defendant in the state circuit court.

Helen S. Barney, Margret C. H. Barney, and Charlie and Anna M. Pinson, were party Plaintiffs below but are not Petitioners before this Court. The Burlington Northern Railroad Company, Inc. and the United States of America were at various times party Defendants below. They are not Respondents before this Court.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Chicago v. Northwestern Transportation Company v. Kalo Brick and Tile Company, 450 U.S. 313, 321-323, 101 S.Ct. 1124, 1132-1133, 67 L.Ed 2d 258 (1981) 8

City of Aberdeen v. Chicago and Northwestern Transportation Company, 602 F.Supp. 589 (D.C.S.D. 1984) 8, 9

Great Northern Railroad Company v. United States, 315 U.S. 262, 62 S.Ct. 529, 86 L.Ed. 836 (1942) 9

Harris v. Ski Park Farms, Inc., 814 Pac. 2d 684, 686 (Wa. 1991) 8

Helen S. Barney, et al. v. State of South Dakota, et al., was reported at 490 N.W. 2d 726 (SD 1992) 1

Idaho v. Oregon Short Line Railroad Company, 617 F.Supp. 208 (D.C.Id. 1985) 9

Presault v. I.C.C., 494 U.S. 1, 110 S.Ct. 914, 108 L.Ed 2d 1 (1990) 7, 10

Vieux v. East Bay Regional Park District, 906 F. 2d 1330 (9th Cir. 1990), cert. denied, 498 U.S. ___, 111 S.Ct. 430, 112 L.Ed 2d 414 (1990) 8, 9

STATUTES

16 U.S.C. § 1247(d) 5, 7, 10

43 U.S.C. § 912 ..... *passim*

43 U.S.C. § 934 ..... 3, 4, 6, 8

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OPINIONS BELOW

The opinion of the Supreme Court of the State of South Dakota in *Helen S. Barney, et al. v. State of South Dakota, et al.*, was reported at 490 N.W. 2d 726 (SD 1992), and appears in the Appendix (A-1). The first memorandum decision of the state circuit court, dated November 1, 1990, appears in the Appendix (A-29). The state circuit court's second memorandum decision of April 8, 1991, appears in the Appendix (A-40).

JURISDICTIONAL STATEMENT

The opinion of the South Dakota Supreme Court was filed on September 9, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Act of March 8, 1922, c. 94, 42 Stat. 414, codified at 43 U.S.C. § 912.

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right-of-way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture

> or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: Provided, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: Provided further, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

2. Act of March 3, 1875, c. 152, § 1, 18 Stat. 482, codified at 43 U.S.C. § 934.

> The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its Articles of Incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earths, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine

shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

STATEMENT OF THE CASE

Petitioners seek this Court's review of questions of federal law passed upon by the Supreme Court of the State of South Dakota and the circuit court for the Seventh Judicial Circuit, in and for the County of Pennington, South Dakota. Petitioners' timely raised these federal law questions in their complaint commencing this case and in their cross-motion below for summary judgment. The state circuit court ruled on these federal law questions in its memorandum decisions, Appendix (A-29) and (A-40), and Order Granting Summary Judgment. Appendix (A-20). The Supreme Court of South Dakota entered judgment on these questions in its Opinion filed September 9, 1992. Appendix (A-1).

In the late 1880's the United States granted a right of way under the General Right-of-way Act of 1875, 43 U.S.C. § 934, across public lands in the Black Hills of South Dakota to the predecessors of the Burlington Northern Railroad. Subsequently, the United States conveyed by patent the land underlying these right-of-ways in fee title ownership to Petitioners' predecessors. Although the railroad was in existence at the time of these conveyances the patents do not mention the railroad or its right-of-way.

On August 1, 1983, the Burlington Northern Railroad filed an application with the Interstate Commerce Commission (I.C.C.) requesting a certificate allowing the railroad to abandon its line between Hill City and Deadwood, South Dakota. The I.C.C. issued its certificate and decision on September 9, 1983, granting abandonment authority to the railroad. On January 23, 1984, the railroad, by letter, informed the I.C.C. that it had actually abandoned the line effective January 13, 1984.

In August, 1983, after the railroad had filed its abandonment application with the I.C.C. Respondent expressed interest in obtaining the railroad right-of-way for use as a recreational trail under the provisions of the National Trails System Act Amendments of 1983, Pub.L. 98-11, 97 Stat. 48, codified at 16 U.S.C. § 1247(d). Respondent, however, subsequently abandoned its claim before the I.C.C. to the right-of-way.

Later, in 1986, Respondent together with the then established Black Hills Rails-to-Trails Association, began negotiations with the Burlington Northern Railroad to acquire the right-of-way. In 1988 and 1989 Respondent and the railroad entered into several agreements whereby the railroad agreed to donate to Respondent all of the railroad's right, title and interest in the right-of-way from Custer to Deadwood, South Dakota. The railroad conveyed the same to the Respondent by quit claim deeds.

On October 9, 1987, Petitioners, claiming reversion of the right-of-way to them commenced a quiet title action in state circuit court. Respondent intervened in that action and moved for summary judgment. Petitioners cross-moved for summary judgment. Respondent claimed

that it had obtained valid acquisition of the right-of-way from the railroad under 43 U.S.C. § 912.

On July 24, 1991, the trial court granted summary judgment to Respondents. The trial court ruled that 43 U.S.C. § 912 applied to the right-of-way and that under this statute there had neither been a judicial declaration or decree of abandonment nor an Act of Congress recognizing abandonment of the right-of-way by the railroad. Specifically, the trial court determined that the I.C.C. certificate and approval of abandonment did not amount to an Act of Congress declaring or decreeing abandonment as required by 43 U.S.C. § 912. The trial court also held that Petitioners' reversionary interests in the right-of-way had not vested because Respondents had developed a public highway within one year of abandonment as required by the statute and, therefore, no taking had occurred entitling Petitioners to compensation.

The South Dakota Supreme Court agreed with the rulings of the trial court. The state Supreme Court in its opinion of September 9, 1992, held that (1) 43 U.S.C. § 912 applies to the right-of-way granted to the predecessors of the Burlington Northern Railroad under the General Right-of-Way Act of 1875; (2) the right-of-way had not been abandoned as required under the provisions of 43 U.S.C. § 912 by an Act of Congress; (3) Respondent's proposed recreational trail along the right-of-way constituted the establishment of a public highway under the federal statutes; and (4) Petitioners were not entitled to compensation for a taking of their interest in the right-of-way.

REASONS FOR GRANTING THE WRIT

The conversion of abandoned or discontinued railroad rights-of-way has become an increasingly popular undertaking across the country. Congress sought to promote these conversions through the enactment of the National Trails System Act Amendments of 1983, Pub.L. 98-11, 97 Stat. 48, 16 U.S.C. § 1247(d). This Court has previously ruled on the constitutional authority of the Congress to do so. *Presault v. I.C.C.*, 494 U.S. 1, 110 S.Ct. 914, 108 L.Ed. 2d 1 (1990).

For those persons like Respondent, however, who for one reason or another had failed or are unable to claim an abandoned right-of-way for trail purposes under the provisions of the National Trails Systems Act, 43 U.S.C. § 912 stands as a back door approach as yet unreviewed by this Court for acquiring a right-of-way for trail purposes. In effect, this statute granted to Respondent in this case and will grant to others similarly situated in the future a second chance to take a right-of-way for trail purposes when the specific procedure provided for by the Congress in the National Trails Systems Act Amendments of 1983 has not been followed.

The federal law questions presented by Petitioners have not been directly addressed by the federal circuit courts of appeal. The opinion of the South Dakota Supreme Court, therefore, stands as the most authorization interpretation of federal law on these questions and will undoubtedly be looked to as authority by other courts in the next several years considering cases involving the conversion of abandoned railroad rights-of-way to recreational trails.

One circuit court though has issued an opinion interpreting 43 U.S.C. § 912 as it relates to Petitioners' questions. In *Vieux v. East Bay Regional Park District*, 906 F. 2d 1330 (9th Cir. 1990), cert. denied, 498 U.S. ___, 111 S.Ct. 430, 112 L.Ed. 2d 414 (1990), the Ninth Circuit held that 43 U.S.C. § 912 should apply to right-of-way grants under the 1875 Act, 906 F. 2d at 1335, and further appeared to conclude that abandonment authority granted by the I.C.C. pursuant to delegation of responsibility for railroad abandonments to the I.C.C. by the Congress does not constitute a requisite Act of Congress decreeing or declaring abandonment for purposes of 43 U.S.C. § 912. *Vieux*, 906 F. 2d at 1339. The Ninth Circuit did not conclusively rule, however, as to the proper interpretation of 43 U.S.C. § 912's "Act of Congress" language and left the door open on the question whether I.C.C. authority to abandon complies with the "Act of Congress" requirement of the statute. *Vieux*, 906 F. 2d at 1339.

On this question, however, the Supreme Court of Washington has ruled that the Congress' grant of plenary authority to the I.C.C. to regulate railroad abandonments, *Chicago v. Northwestern Transportation Company v. Kalo Brick and Tile Company*, 450 U.S. 313, 321-323, 101 S.Ct. 1124, 1132-1133, 67 L.Ed. 2d 258 (1981), results in an I.C.C. grant of abandonment authority rising to the level of an Act of Congress for purposes of 43 U.S.C. § 912. *Harris v. Ski Park Farms, Inc.*, 814 P. 2d 684, 686 (Wa. 1991).

Additionally, two United States District Courts have entered directly opposite opinions on the question of whether 43 U.S.C. § 912 applies to rights-of-way granted under the General Right-of-Way Act of 1875. In *City of*

Aberdeen v. Chicago and Northwestern Transportation Company, 602 F.Supp. 589 (D.C.S.D. 1984), the United States District Court for the District of South Dakota held that rights-of-way granted under the 1875 General Right-of-Way Act were not subject to 43 U.S.C. § 912. However, in *Idaho v. Oregon Short Line Railroad Company*, 617 F.Supp. 208 (D.C.Id. 1985), the United States District Court for the District of Idaho held that 43 U.S.C. § 912 does apply to rights-of-way granted under the 1875 Act. In each of these decisions the respective district courts of South Dakota and Idaho relied on their analysis of this Court's discussion of 1875 Act rights-of-way in *Great Northern Railroad Company v. United States*, 315 U.S. 262, 62 S.Ct. 529, 86 L.Ed. 836 (1942). *City of Aberdeen*, 602 F.Supp. at 591-592; *Oregon Short Line*, 617 F.Supp. at 212-213.

The South Dakota Supreme Court's opinion, however, from which Petitioners seek to appeal stands singularly as the most definitive determination of federal law with respect to 43 U.S.C. § 912 on the question of whether an I.C.C. abandonment authorization constitutes an Act of Congress for purposes of this statute. As the Ninth Circuit's decision in *Vieux, supra*, signals, though, the South Dakota court's decision may very well be in error. Only this Court can resolve the doubt and rule with certainty as to the proper meaning and interpretation of 43 U.S.C. § 912 as respects those questions advanced by Petitioners.

CONCLUSION

The decision of the South Dakota Supreme Court in this case from which Petitioners seek appeal stands as the companion ruling with respect to 43 U.S.C. § 912 to this Court's decision in *Presault, supra,* regarding 16 U.S.C. § 1247(d) each pertaining to the acquisition and conversion of abandoned railroad rights-of-way for public trail purposes. Because the questions of federal law involved are significant and unsettled and will have ongoing direct application to the public policy supporting the conversion of abandoned railroad rights-of-way to trails across the nation, this Court is respectfully requested to grant Petitioners' application for Writ of Certiorari enabling this Court's review of the September 9, 1992, decision of the South Dakota Supreme Court interpreting the application of 43 U.S.C. § 912 to claims for conversion of abandoned rights-of-way to use as public trails.

Respectfully submitted,

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AUTHORIZED PRESS RELEASE
DATE: SEP 11 1992

#17672-a-MEIERHENRY, Circuit Judge

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

HELEN S. BARNEY and MARGRET C.H. BARNEY; FLORENCE L. KAUBISCH; LESTER F. HALL and ARADEN J. HALL TRUST; ROY SCHIEFER and BETTY SCHIEFER, husband and wife; CHARLEY C. PINSON and ANNA M. PINSON, husband and wife; and WILLIAM and INA MAE OERLLINE, husband and wife,

Plaintiffs and Appellants,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, INC., UNITED STATES OF AMERICA, and all persons unknown who have or claim to have any interest of estate, or lien or encumbrance in or upon the premises described in the complaint,

Defendants,

and

STATE OF SOUTH DAKOTA,

Intervenor-Defendant
and Appellee.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE MERTON B. TICE, JR.
Judge

* * * *

ARGUED APRIL 21, 1992
OPINION FILED SEP 09 1992

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REED C. RICHARDS Deadwood, South Dakota	Attorneys for Amici Curiae Black Hills Rails to Trails Association; South Dakota Park and Recreation Owners Association; Black Hills Volkssport Association; South Dakota Snowmobile Association; Missouri Breaks Chapter of the National Audubon Society; and Rails to Trails Conservancy.

MEIERHENRY, Judith

Landowners seek to quiet title to a railroad right-of-way running across their lands from Custer to Deadwood, South Dakota. The State of South Dakota (State) claims it is entitled to the right-of-way. The landowners claim that the State's conversion of the right-of-way into recreational trails is a taking of their reversionary interests deserving of compensation from the State.

FACTS

Congress under the provisions of the General Right-of-Way Act of 1875, 43 U.S.C. § 934,[1] granted right-of-way corridors across public lands to the Grand Island and Wyoming Central; Burlington and Missouri; and Chicago Burlington and Quincy Railroads. The rights-of-way crossed public lands in the Black Hills of South Dakota. The United States Government subsequently conveyed the underlying patented lands subject to the railroad rights-of-way. Helen and Margret Barney, Florence Kaubisch, Lester Hall and M/Bank, as Trustees, Roy and Betty Schiefer, Charley and Anna Pinson, and William and Ina Oerlline (Landowners) are the successors in interest to those land patents. The Burlington Northern Railroad (Railroad) is the successor in interest to the railroad rights-of-way.

On August 1, 1983, the Railroad filed an application with the United States Interstate Commerce Commission (I.C.C.) requesting a certificate of public convenience and

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[1] Originally enacted as The General Railroad Right-of-Way Act of March 3, 1875, ch. 152, § 118 Stat. 482, *repealed by* Pub. L. No. 94-579, 90 Stat. 2793 (1976).

necessity allowing the Railroad to abandon its lines between Hill City and Deadwood, South Dakota. The I.C.C. issued a certificate and decision on September 9, 1983, granting the Railroad the authority to abandon the lines. On January 23, 1984, the Railroad informed the I.C.C. that actual abandonment of the lines was effected on January 13, 1984.

Beginning in the summer of 1983, the State through the Department of Game, Fish, and Parks expressed interest in developing the right-of-way for recreational trails. The State planned to develop the recreational trails primarily for pedestrian, bicycle, horse, cross-country skiing, and snowmobiling. In 1986, the State, along with the Black Hills Rails-to-Trails Association, began negotiating with the Railroad. In 1988 and 1989, the State and the Railroad entered into agreements whereby the Railroad agreed to donate to the State all of its right, title and interest to the right-of-way from Custer to Deadwood, South Dakota.

On October 9, 1987, Landowners, claiming title to the right-of-way, filed a quiet title action.[2] The Landowners were not attempting to prevent the development of the recreational trail or to challenge the desirability of the recreational trail. The Landowners' request was for compensation. The State intervened and moved for summary judgment. The parties agreed that there were no issues of material fact, and on July 24, 1991, the trial court granted

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[2] The Railroad and the United States of America were both named in the quiet title action and later dismissed from the case.

summary judgment to the State. The trial court determined that the Railroad right-of-way and its abandonment are governed by 43 U.S.C. § 912 (§ 912) requiring either a declaration or decree of abandonment by a court of competent jurisdiction or an act of Congress. The trial court also determined that the I.C.C.'s certificate and approval of abandonment did not amount to a congressional decree of abandonment under § 912 and that abandonment occurred upon the trial court's decree. The trial court further found that the Landowners' reversionary interest did not vest because the State developed "a public highway," i.e., a public recreational trail within the one year period required by § 912 and SDCL 49-16A-115; therefore, no taking occurred, and the Landowners were not entitled to compensation. We agree.

ISSUES

I.

WHETHER § 912 APPLIES TO THE RIGHT-OF-WAY GRANTED TO THE RAILROAD?

II.

IF SO, WHETHER THE RAILROAD'S RIGHT-OF-WAY HAS BEEN LEGALLY ABANDONED UNDER THE PROVISIONS OF § 912 EITHER BY AN ACT OF CONGRESS OR A DECREE OF A COURT OF COMPETENT JURISDICTION AND WHETHER THE STATE'S PROPOSED RECREATIONAL TRAIL ALONG THE RAILROAD RIGHT-OF-WAY CONSTITUTES THE ESTABLISHMENT OF A PUBLIC HIGHWAY WITHIN ONE YEAR OF ABANDONMENT?

III.

WHETHER THE LANDOWNERS ARE ENTITLED TO COMPENSATION FROM THE STATE FOR THE STATE'S TAKING OF THEIR INTEREST IN THE RAILROAD RIGHT-OF-WAY?

ANALYSIS

I. APPLICATION OF § 912

The Landowners claim that rights-of-way granted by the United States to the railroads under the 1875 Act are common law easements which automatically extinguish and revert to the underlying landowner when they cease to be used for railroad purposes and that the rights-of-way are not subject to the reversion provisions of § 912. Section 912 provides:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted. . . .

The historical background of § 912 begins with the role of Congress in railroad development. Beginning in 1850 Congress, for the first time, enacted a bill that explicitly granted public lands to aid construction of a cross-country railroad. Act of Sept. 20, 1850, 9 Stat. 466. First, lines were built connecting the southern states with Illinois. Then, spurred by the California gold rush and the Civil War, Congress wanted the railroads to expand to provide passage to the western United States. Congress gave generous land grants from the public domain to the railroads to subsidize the costs of the western expansion. The Union Pacific Act of 1862 created the impetus to begin laying track from the 100th meridian, a point in the Platte River Valley near Kearney and North Platte, Nebraska, to California. Act of July 1, 1862, 12 Stat. 489; *see*, Leo Sheep Co., 440 U.S. 668, 59 L.Ed. 2d 677, 99 S.Ct. 1403 (1979).[3]

In 1872, Congressional policy changed; the House of Representatives enacted a resolution condemning its policy of outright land grant subsidies to railroads. *Leo Sheep Co., supra*. Congress, instead, reserved the land for homesteads and educational purposes. Great Northern R. Co. v. United States, 315 U.S. 262, 273-4, 86 L.Ed. 836, 62 S.Ct. 529 (1942). Nevertheless, Congress continued to encourage development of the west and enacted the General Railroad Right-of-Way Act in 1875 (1875 Act) which gave easements to railroads across public lands. 43 U.S.C. § 934. The right-of-way at issue in this case was granted by the 1875 Act.

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[3] Chief Justice Rehnquist writing for the Court unfolds a colorful history and background of this period.

Subsequently, the United States transferred much of the underlying lands to homesteaders and others subject to the railroad rights-of-way. In the early 1920's, Congress passed statutes designating procedures for distribution of the rights-of-way when the railroads abandoned their lines. 43 U.S.C. § 913 (1920), 43 U.S.C. § 912 (1922), 23 U.S.C. § 316 (1921).[4]

The Landowners contend that § 912 applies only to reversionary rights held by the United States and that the 1875 Act left no retained interest with the United States.[5] The nature of the property interest held by the United States Government, the Landowners or the Railroad is defined and controlled by federal legislation and is, therefore, a federal question. Northern P. R. Co. v. Townsend, 190 U.S. 267, 47 L.Ed. 1044, 23 S.Ct. 671, (1903). The U.S. Supreme Court defined the right-of-way interest conveyed to the railroads as a "limited fee, made on an implied condition of reverter." *Id.* 190 U.S. at 271, 47 L.Ed. at 1047, 23 S.Ct. at 672; Rio Grande Western R. Co. v. Stringham, 239 U.S. 44, 60 L.Ed. 138, 36 S.Ct. 5 (1915).

The U.S. Supreme Court in 1942 in *Great Northern, supra,* further defined the nature of the property right

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[4] *See generally,* Note, Reversion of Railroad Right of Way in South Dakota After Haack v. Burlington Northern, Inc., 28 S.D.Law Rev. 196 (Winter 1982).

[5] Landowners rely upon City of Aberdeen v. Chicago & North. Transp., 602 F.Supp. 589 (D.C.S.D. 1984) in which Judge Porter held that § 912 did not apply to railroad easements granted under the 1875 Act. We do not adopt the reasoning of the *Aberdeen* case.

given to the railroads by the 1875 Act. The Court determined that Congress conveyed an easement, not a fee simple in the right-of-way. The U.S. Supreme Court discussed the nature of the property interest conveyed by the 1875 Act in *Great Northern* but did not address the applicability of the reversion procedures in §§ 912 or 913. The main question before the Court in *Great Northern* was whether the United States conveyed a fee title to the railroads by the 1875 Act. *Great Northern* stands only for the proposition that the underlying landowner – the U.S. Government – owned the mineral rights beneath the right-of-way. *See also,* United States v. Union P. R. Co. 353 U.S. 112, 1 L.Ed.2d 693, 77 S.Ct. 685 (1957). Reversionary interests in the right-of-way of a third party adjoining landowner or even the United States Government were not at issue in *Great Northern.*

A recent federal case which addressed the issue of reversionary interests in abandoned railroad rights-of-way is Vieux v. East Bay Regional Park Dist., 906 F.2d 1330 (1990), *cert. denied* 498 U.S. ___, 111 S.Ct. 430, 112 L.Ed. 2d 414 (1990). The *Vieux* court determined that § 912 applied to 1875 grants:

> In 1922, Congress passed 43 U.S.C. § 912 (Disposition of Abandoned Railroad Grants) as part of the Public Lands Act to ensure that railroad rights of way would continue to be used for public transportation purposes. Although the U.S. Supreme Court has not addressed whether the change in 1871 in the nature of the grants, from "limited fee with right of reverter" to "exclusive easement," affects the application of § 912, we agree with the district court's Memorandum and Order of March 2, 1987, in that the

> statute applies to grants both before and after 1871. (citation omitted).

Id. 906 F.2d at 1335.

The easement granted by Congress is an easement subject to the intentions and specifications of Congress; it is not a common law easement.

> Congress could pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests. In other words, even if the 1875 Act granted only an easement, it does not necessarily follow that Congress would or did not intend to retain an interest in that easement.
>
> . . .
>
> The precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law.

State of Idaho v. Oregon Short Line R. Co., 617 F.Supp. 207, 212 (D.C. Idaho 1985) (*Idaho I*). It is clear from the legislative history that Congress assumed it possessed some type of reversionary or other interest in the railroad rights-of-ways. H.R. Rep. No. 217, 67th Cong., 1st Sess. 1 (1921); H.R. Rep. No. 843, 66th Cong., 2d Sess. 2 (1920) cited in *Idaho I*, 617 F.Supp. at 211.

Under the broad power over interstate commerce, Congress has authority to grant railroad easements subject to its own terms and conditions. Congress wanted to preserve a corridor of public transportation, especially the railroad transportation, for further development of the western United States. Congress kept an interest in

the railroad easements in order to influence future development and eventual disposition. *Idaho I, supra.*[6] The Nation's railway system reached its peak of 272,000 miles in 1920 and has steadily declined.[7] Fewer than half of those miles are in use today. As travel shifted from railways to highways, Congress turned its attention to preserving public highways. The Congressional Record which accompanied the enactment of § 912 shows Congress's intent to preserve railroad corridors for "public highway" use.

> The attention of the committee was called to the fact that in some cases highways have been established on abandoned rights-of-way and it might be desirable to establish highways on such as may be abandoned in the future. Recognizing the public interest in establishment of roads, your committee safeguarded such rights by suggesting the amendments above referred to protecting not only roads now established, but giving the public authorities one year's time after a decree of forfeiture or abandonment to establish a public highway upon any part of such right-of-way.

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[6] "An examination of the congressional debate on the 1875 Act reveals that there was extensive discussion of Congress' continuing commerce power over railroad rights-of-way. Cong.Rec., 43rd Cong.2d Sess., vol. 3, pp. 404-06." *Idaho I*, 617 F.Supp. at 212 n.4.

[7] See authorities cited in Comment, *Rails to Trails: Converting America's Abandoned Railroads Into Nature Trails*, 22 Akron L.Rev. 645, 645 (1989).

S. Rep. No. 338, 67th Cong., 2nd Sess. 1 (1922). Congress also encouraged the development of highways by the language of 23 U.S.C. § 316 enacted in 1958 which reads:

> For the purposes of this title the consent of the United States is given to any railroad or canal company to convey to the State highway department of any State, or its nominee, any part of its right-of-way or other property in that State acquired by grant from the United States.

In interpreting statutory language, conveyances by the government are to be construed to carry out the intent of the grantor. To ascertain Congressional intent we must look to the condition of the country when the acts were passed and the purpose as declared on the face of the act and read all parts together. *Leo Sheep Co., supra*. To say that § 912 does not apply to the easements granted under the 1875 Act would, in effect, nullify the intent of Congress.

> These statutes [43 U.S.C. §§ 912, 913 and 23 U.S.C. 316] would be rendered null if this Court were to find them inapplicable to 1875 Act rights-of-way, for they were specifically enacted to dispose of the United States' retained interest in 1875 Act rights-of-way. [See H.R.Rep. No. 217, 67th Cong., 1st Sess. 1 (1921); H.R.Rep. No. 843, 66th Cong., 2d Sess. 2 (1920).]

Idaho I, 617 F.Supp. at 212. We conclude that the United States Government retained a reversionary interest in railroad rights-of-way, including those granted post 1871 and that § 912 applies to the right-of-way granted to the Railroad.

II. ABANDONMENT AND REVERSION UNDER § 912

A. Decree by Court or Act of Congress

Having determined that § 912 applies to the abandonment and reversion of the right-of-way, this court must then determine if the statutory requisites were met. We adopt the test used in *Vieux*: "[i]n order for reversionary rights to vest under § 912, the railroad must 1) cease 'use and occupancy' of the rights of way and 2) abandonment must be 'declared or decreed' by a court of competent jurisdiction or a congressional act." *Vieux*, 906 F.2d at 1337.

There is no dispute that the railroad has ceased to use or occupy the right-of-way as required by the statute. The issue lies with the second part of the test. The Landowners contend that Congress has delegated its authority to supervise and regulate railroad abandonments to the I.C.C. and that the I.C.C.'s authorization of abandonment falls within § 912 as an "Act of Congress."[8] Legislative history makes it clear that Congress intended that any reversion or forfeiture of the rights-of-ways must be decided by a court or special act of Congress. During

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[8] Landowners cite Harris v. Ski Park Farms, Inc., 814 P.2d 684 (Wash. App. 1991) as authority. The issue in *Harris* was construction of a deed which conveyed adjacent property excepting the railroad right-of-way which had been abandoned prior to the transfer. The *Harris* court concluded that the I.C.C. authorization of abandonment was sufficient to meet the statutory requirements of § 912. The *Harris* decision is limited to interpreting the language of a deed and the intention of the conveying party. There was no attempt by the state or anyone else to establish a public highway along the right-of-way. We find that *Harris* is distinguishable.

House debate, Representative Christopherson of South Dakota, a manager for the bill, explained the amendment which required abandonment to be "declared or decreed by a court of competent jurisdiction or by act of Congress." The text of the Congressional Record reads as follows:

> MR. GARD. The objection which was in my mind was that without any process by anybody, except the proof of the matter of abandonment, the title to this land vested in some subdivision which was outside a municipality, and simply because a man might own a piece of ground contiguous to this abandoned land, by virtue of the ownership and no other action he became entitled to this abandoned land. It seems to me there ought to be some approval by some one who has charge of the land rather than have the automatic addition to the man's own land.
>
> MR. CHRISTOPHERSON. This does not do that automatically. The bill was originally drawn so that it would automatically do it, but by the suggestion of the department there was a committee amendment which has been submitted by the committee and which I will read – whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by act of Congress.
>
> With that amendment the parties would either have to go into court and get a decree declaring the land forfeited in a competent court *or by a special act of Congress*. We should also bear in mind that this does not operate upon any railroad lands, excepting those that have been granted by the Government for railroad purposes alone, . . .

Cong. R. House 8046 (May 31, 1920)(emphasis added). The legislative history indicates that Congress did not intend to delegate its abandonment authority to the I.C.C.

We adopt the reasoning of the Ninth Circuit U.S. Court of Appeals in *Vieux*:

> [T]he I.C.C. approval of abandonment, even in formal abandonment proceedings, is only a determination that under its Congressional mandate, cessation of service would not hinder I.C.C.'s purposes. It is not a determination that the railroad has abandoned its lines. Lastly, the only remedy for an "illegal" abandonment, that is one that is not approved by the I.C.C., is an injunction brought by the I.C.C., the U.S. or a state government. Thus, a railroad could abandon without any involvement from the I.C.C., if there is no injunctive action brought and if a court decrees that the railroad has abandoned the line. The I.C.C. regulations and process determine what effects an abandonment will have and what the railroad must do to counteract those effects before it abandons, but they do not determine that an abandonment has actually occurred. (citations omitted)

Vieux, 906 F.2d at 1339. *See*, State by Wash. Wildlife Preservation v. State, 329 N.W.2d 543 (Minn. 1983), *cert. denied*, 463 U.S. 1209, 77 L.Ed.2d 1390, 103 S.Ct. 3540 (1983). We agree with the trial court that the right-of-way in the present case was not legally abandoned until the trial court so decreed.

B. Establishment of a Highway Within One Year of Abandonment

The Landowners contend that a recreational trail as proposed by the State is not a public highway within the meaning of § 912. State law determines what constitutes a "public highway legally established" for purposes of federal land grant statutes, including § 912. Standage Ventures, Inc. v. Arizona, 499 F.2d 248 (9th Cir.1974) cited in *Vieux*, 906 F.2d at 1341.

A public highway is defined as "a passage or road which 'every citizen has a right to use.' " Lawrence v. Ewert, 21 S.D. 580, 583, 114 N.W. 709, 710 (S.D. 1908). South Dakota law defines "highway" as "[e]very way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel." SDCL 31-1-1; Dave Gustafson & Co. v. State, 84 S.D. 238, 242, 169 N.W.2d 722, 724-725 (S.D. 1969). Vehicles may include snowmobiles and bicycles. SDCL 32-14-1. Federal law specifically recognizes and authorizes the conversion of railroad rights-of-way to recreational trails in the Trails Act 16 U.S.C. §§ 1241 et seq.[9] The recreational trail proposed by the State is open to the public for snowmobiling and bicycling and, therefore, falls within the definition of highway under state law. The State established the trail within the one year statutory period.

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[9] *See* Comment, *supra* note 7.

III. COMPENSATION

The railroad right-of-way is preserved as a public transportation corridor in accordance with 43 U.S.C. §§ 912 and 913, 23 U.S.C. § 316 and South Dakota statutory law, SDCL 49-16A-115. The Landowners contend that the State has taken their reversionary interest for use as a public recreational trail and that under the South Dakota Constitution art. VI, § 13, the State should pay compensation for the taking. Section 13 reads in part: "Private property shall not be taken for public use, or damaged, without just compensation, . . . "

The U.S. Supreme Court in Preseault v. I.C.C., 494 U.S. 1, 108 L.Ed.2d 1, 110 S.Ct 914 (1990) in addressing the constitutionality of a federal "rails-to-trails" statute determined that whether or not a taking had occurred depended upon the legal status of the reversionary interest. *Id.* The South Dakota Legislature requires a railroad to settle reversionary interest title claims to right-of-way easements within one year after abandonment pursuant to federal requirements of § 912.

> A railroad which abandons service over, salvages and removes its rail, ties and other track material from any right-of-way in which it claims any right, title or interest in public lands, as prescribed by the act of Congress approved March 3, 1875, as amended, or in Indian lands as prescribed by the act of Congress approved March 2, 1889, as amended, or § 49-16A-55, shall settle title claims with adjoining landowners and municipalities within one year after salvage of the abandoned road is complete or title to the abandoned railroad right-of-way easement

> reverts and vests, by operation of law, pursuant to 42 Stat. 414 (March 8, 1922)[§ 912].

SDCL 49-16A-115. The state statute explicitly defers to § 912 to determine when reversionary interests vest.

Under the provisions of § 912, the Railroad has transferred the right-of-way to the State for use as a public highway. Hikers, bikers, skiers, and snowmobilers will use the right-of-way, and, as such, the right-of-way will continue to be used as a public highway compatible and consistent with its prior use as a public railway. No greater burden has been placed upon the servient estate. "It has long been held that the holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in aid of the general purpose of which the easement was acquired are permissible." *Wash. Wildlife*, 329 N.W.2d at 546. The Landowners acquired the property subject to the right-of-way traversing the land. Their interest has not been diminished by converting the right-of-way to a public recreational trail. The Landowners' reversionary rights will not mature until the right-of-way ceases to be used as a public highway. Therefore, there has been no taking and the Landowners are not entitled to compensation from the State.

We affirm the decision of the circuit court on all issues.

MILLER, Chief Justice, and WUEST, Justice, and McKEEVER, Circuit Judge, and STEELE, Circuit Judge, concur.

McKEEVER, Circuit Judge, for HENDERSON, Justice, disqualified.

STEELE, Circuit Judge, for SABERS, Justice, disqualified.

MEIERHENRY, Circuit Judge, for AMUNDSON, Justice, disqualified.

STATE OF SOUTH DAKOTA)
) ss
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

HELEN S. BARNEY and MARGRET C.H. BARNEY; FLORENCE L. KAUBISCH; LESTER F. HALL and M/BANK, TRUSTEES OF THE LESTER F. HALL and ARADEN J. HALL TRUST; ROY SCHIEFER and BETTY SCHIEFER, husband and wife; CHARLEY C. PINSON and ANNA M. PINSON, husband and wife; and WILLIAM and INA MAE ORELLINE, husband and wife, Plaintiffs, v. BURLINGTON NORTHERN RAILROAD COMPANY, INC., UNITED STATES OF AMERICA, and all persons unknown who have or claim to have any interest of estate, or lien or encumbrance in or upon the premises described in this Complaint, Defendants, and STATE OF SOUTH DAKOTA, Intervenor-Defendant.	FILE NO. 88-373 ORDER GRANTING SUMMARY JUDGMENT TO THE STATE (Filed July 31, 1991)

WHEREAS this matter was initially brought by the Plaintiffs herein, requesting that title to a railroad bed be quieted in them; and

WHEREAS the Burlington Northern Railroad Company, initial Defendant herein, answered and denied, as well as claimed title on its own behalf, in its answer herein but does not contest the State's claim, having transferred all interests it may have had to the State;

WHEREAS the State of South Dakota intervened and asserted that it has title to certain lands at issue here, hereinafter described, either by fee title taking under the Burlington Northern Railroad Company, or pursuant to 43 U.S.C. § 912, 43 U.S.C. § 913, or 23 U.S.C. § 316; and

WHEREAS both parties have filed cross-motions for summary judgment, and agree that there are no genuine issues of material fact in dispute, and both have requested summary judgment; and

WHEREAS both counsel have advised the Court that the facts are not materially in dispute and that the affidavits and discovery materials on file set out the facts to which the Court may now apply the law as found by the Court, now it is therefore

WHEREAS this Court has found that there are no genuine issues as to any material fact, and that the State is entitled to judgment as a matter of law; and

WHEREAS both counsel have advised the Court that the facts are not materially in dispute and that the affidavits and discovery materials on file set out the facts, to which the Court may now apply the law as found by the Court, now it is therefore

ORDERED, ADJUDGED AND DECREED that there has been no judicial or congressional finding of abandonment prior to this Order since the Interstate Commerce Commission has no authority to declare abandonments and no court, nor any congressional act, has previously done so; and it is further

ORDERED, ADJUDGED AND DECREED that the State of South Dakota has succeeded to the interest held by the Burlington Northern Railroad Company, through grant by said company, Quitclaim Deed dated April 28, 1988, filed for record October 2, 1990, at 11:15 a.m., and recorded in Book 40 of Deeds, page 6672, Records of the Register of Deeds, Pennington County, South Dakota, and that pursuant to said grant, the State is entitled to establish a public highway, and the Court finds it has established such highway, over, across and upon the right-of-way at issue herein, described in said deed, a copy of which is attached hereto, marked Exhibit A, and by reference incorporated herein, all pursuant to 43 U.S.C. § 913 and 23 U.S.C. § 316; and it is further

ORDERED, ADJUDGED, AND DECREED that pursuant to 43 U.S.C. § 912, the State of South Dakota has the right to establish, and the Court finds that it has established upon, over, and across the railroad right-of-way of the Defendant Burlington Northern Railroad Company, said right-of-way being specifically described in the Quitclaim Deed attached hereto, marked Exhibit A, and by reference incorporated herein, a public highway, for public transportation and/or recreational use, within one year after the date of a judicial declaration of abandonment of the right-of-way; and it is further

ORDERED, ADJUDGED AND DECREED that use for railroad purposes of the railroad right-of-way described in Exhibit A hereto, has, as of the date hereof, ceased in fact, and as of the date hereof, said right-of-way is abandoned for railroad purposes; no reversion of title in surrounding landowners has, however, occurred since one year after the date of a judicial declaration of abandonment of the right-of-way has not yet run; and it is further

ORDERED, ADJUDGED AND DECREED that the State of South Dakota has established a public highway and/or recreational trail over, upon, and across the railroad right-of-way described in Exhibit A hereto, by both express and implied dedication of the right-of-way as a public highway, as against the following named Plaintiffs, over, upon and across the following described lands, to wit:

a. The State of South Dakota has established its public highway, and/or recreational trail by express and implied dedication of the right-of-way as a public highway, upon, over, and across the Burlington Northern Railroad right-of-way, as against Plaintiffs Helen S. Barney and Margaret C.H. Barney upon, over and across the following described property:

> Blocks 2, 3, 4, and 5 in the Northeast Quarter (NE¼) of the Southeast Quarter (SE¼) of Section Eight (8), Township One North (T1N), Range Four East (R4E) of the Black Hills Meridian, Pennington County, South Dakota;

b. The State of South Dakota has established its public highway and/or recreational trail by express and

implied dedication of the right-of-way as a public highway upon, over and across the Burlington Northern Railroad Company right-of-way, as against Plaintiff Florence L. Kaubisch, upon the following described property:

> West Half (W1/2) of the Southwest Quarter (SW1/4) of the Northwest Quarter (NW1/4) Southeast Quarter (SE1/4) of the Southwest Quarter (SW1/4) of the Northwest Quarter (NW1/4), South Half (S1/2) of the Southeast Quarter (SE1/4) of the Northwest Quarter (NW1/4), and the Southwest Quarter (SW1/4) of Section Twenty-eight (28), Township One North (T1N), Range Four East (R4E) of the Black Hills Meridian, Pennington County, South Dakota;

c. The State of South Dakota has established its public highway and/or recreational trail by express and implied dedication of the right-of-way as a public highway upon, over and across the Burlington Northern Railroad Company right-of-way, as against Plaintiffs Lester F. Hall and M./Bank Trustees of the Lester F. and Araden J. Hall Trust, upon, over and across the following described property:

> New Hope Mining Claim group designated as Mineral Survey No. 974, and comprised of the Kern, Fraction, Augusta, Margaret, New Hope and Bramble Lodes located in Section Twenty-three (23), Township Two North (T2N), Range Three East (R3E) of the Black Hills Meridian, Pennington County, South Dakota;

d. The State of South Dakota has established its public highway and/or recreational trail by express and

implied dedication of the right-of-way as a public highway upon, over and across the Burlington Northern Railroad Company right-of-way, as against Plaintiffs Roy Schiefer and Betty Schiefer, husband and wife, upon the following described property:

> Lot B of the subdivision of Enos Placer, M.S. 1024, in the North Half (N1/2) of Section Twenty-nine (29), Township Two North (T2N), Range Four East (R4E) of the Black Hills Meridian, Pennington County, South Dakota;

e. The State of South Dakota has established its public highway and/or recreational trail by express and implied dedication of the right-of-way as a public highway upon, over and across the Burlington Northern Railroad Company right-of-way as against Plaintiff Anna M. Pinson, and Plaintiff Charlie C. Pinson, and any or all successors to Plaintiff Charlie C. Pinson, upon the following described property:

> Lot A of the subdivision of Enos Placer, M.S. 1024, in the North Half (N1/2) of Section Twenty-nine (29), Township Two North (T2N), Range Four East (R4E) of the Black Hills Meridian, Pennington County, South Dakota;

f. The State of South Dakota has established its public highway and/or recreational trail by express and implied dedication of the right-of-way as a public highway upon, over and across the Burlington Northern Railroad Company right-of-way, as against Plaintiff William J. Orelline, upon the following described property:

> Lot Fourteen A (14A) of Rochford townsite patent subdivision, in the Northeast Quarter (NE1/4) Section Twenty-three (23), Township

Two North (T2N), Range Three East (R3E) of the Black Hills Meridian, Pennington County, South Dakota;

g. The State of South Dakota has established its public highway and/or recreational trail by express and implied dedication of the right-of-way as a public highway upon, over and across the Burlington Northern Railroad Company right-of-way as against Plaintiffs William J. Orelline and Ina Mae Orelline upon the following described property:

West 93.22 feet of Lot Three (3) of Walter Gold Mining Lode, MS 1928, in the Northeast Quarter (NE¼) of Section Twenty-three (23), Township Two North (T2N), Range Three East (R3E) of the Black Hills Meridian, Pennington County, South Dakota;

and it is further

ORDERED, ADJUDGED AND DECREED, that no reversion of title has yet taken place in the railroad line described in Exhibit A, hereto, due to the fact that the decree of abandonment is entered herewith, and does not become effective until this Order is entered, thus the one-year period of 43 U.S.C. § 912 will begin to run on entry of this Order; it does not, however, run further because the State has already established its public highway by express and implied dedication; and it is further

ORDERED, ADJUDGED AND DECREED, that Plaintiffs are not entitled to compensation for any taking as provided in the United States Constitution, or the South Dakota Constitution, since no reversion of title in the railroad right-of-way takes place until one year after this decree is entered and Plaintiff's rights have not yet

matured nor can they now mature until abandonment of the right-of-way by the State, the State having established its highway by express and implied dedication; and its [sic] is further

ORDERED, ADJUDGED AND DECREED, that the public highway established on the properties described herein has been established only within the right-of-way described in Exhibit A hereto; and it is further

ORDERED, ADJUDGED AND DECREED, that although Plaintiffs have objected to the State's claim and attempted to restrict access to the property in question, the State has properly exercised dominion over the property in question and has the absolute right to exercise dominion over the right-of-way; and is entitled to exclusive possession thereof; Plaintiffs are, therefore, hereby enjoined and restrained from interfering with the State's access to and dominion over the property; and it is further

ORDERED, ADJUDGED AND DECREED, that the contents of this Court's Memorandum Decisions, dated November 1, 1990, and April 8, 1991, and attached hereto and marked as Exhibits B & C are hereby incorporated by reference into this Order Granting Summary Judgment, with the same force and effect as if the same were fully set out herein; with any inconsistencies being resolved in the following order: (1) the provisions of this Order have precedence over both memorandum decisions; (2) the provisions of the memorandum decision of April 8, 1991, have precedence over those of memorandum decision of November 1, 1990.

Dated this 24 day of July 1991.

BY THE COURT:

/s/ Merton B. Tice, Jr.
Merton B. Tice, Jr.
Circuit Court Judge

ATTEST:

/s/ Bonnie Fitzgerald
Clerk of Court
By: L.J. McLaughlin
Deputy

(SEAL)

Seventh Judicial Circuit Court

P.O. Box 230
Rapid City, South Dakota 57709-0230
(605) 394-2571

CIRCUIT JUDGES
Marshall P. Young
Merton B. Tice, Jr.
Roland E. Grosshans
Jeff W. Davis
John K. Konenkamp, Presiding Judge

COURT ADMINISTRATOR
Corinne M. Ausmann

November 1, 1990

Mr. Scott D. McGregor
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500 East Capitol
Pierre, SD 57501

RE: Barney v. Burlington Northern Railroad
Court File No. 88-373

Dear Gentlemen:

MEMORANDUM DECISION

The Plaintiffs filed a quiet title action with this Court on October 9, 1987, claiming title to the right-of-way underlying the rail lines of Burlington Northern Railroad Company. The State of South Dakota, subsequently, intervened in this action and has moved for Summary Judgment seeking dismissal of Plaintiffs' suit and a judgment that the State is entitled to the interest in the right-of-way

held by the railroad company. The Plaintiffs agree that there are no issues of material fact in dispute and have also moved for Summary Judgment.

Summary Judgment is appropriate, in this case, where there are no genuine issues of material fact. *Koeniguer v. Ekrich*, 422 NW2d 600 (SD 1988); *Bego v. Gordon*, 407 NW2d 801, 803 (SD 1987).

FACTS

The Plaintiffs, in this action, are adjoining landowners to the right-of-way, at issue, which runs from Custer to Deadwood, South Dakota. Burlington Northern Railroad acquired this right-of-way from its predecessor railroad companies, Grand Island and Wyoming Central. These companies were originally granted the right-of-way by the United States in 1890, under the provisions of the General Right-of-Way Act of 1875, 43 USC 934. Under that act, public lands, of the United States, were granted to railroads for their use and occupancy. *Great Northern Railroad Co. v. United States*, 315 US 262, 62 S.Ct. 529, 86 L.Ed. 2 (1942).

Burlington Northern Railroad obtained the right-of-way prior to the land patents issued to the Plaintiffs or their predecessors in title for the legal subdivisions traversed by the rail corridor.

The Burlington Northern Railroad Company, seeking to abandon its rail lines and services, filed an application for authorization to abandon with the United States Interstate Commerce Commission (ICC) on August 1, 1983. The railroad company requested that the Commission

issue it a certificate of public convenience and necessity, thus allowing it to abandon its railroad lines between Hill City and Deadwood, South Dakota. On September 9, 1983, the ICC issued a certificate and decision permitting Burlington Northern to abandon its line between Custer and Deadwood, South Dakota. See ICC Certificate and Decision, Docket No. AB-6 (Sub-No. 162), September 9, 1983. In the decision, the ICC found that the abandonment of this particular line would not have a serious adverse impact on the nearby communities and environment and that the right-of-way involved would be suitable for other public purposes. The railroad company was also required to keep intact all of the right-of-way and property underlying the track, including bridges and culverts, for 120 days to allow any state or local government agencies to negotiate for the right-of-way and rail properties.

Burlington Northern was given one year from the date of the ICC decision to exercise its authority to abandon and to notify the ICC of any actual abandonment. On January 23, 1984, the railroad company sent a letter to the ICC advising them that actual abandonment was effected on January 13, 1984. During the summer of 1983, and thereafter, the State of South Dakota, through the Department of Game, Fish and Parks, contacted various federal agencies, including the ICC, expressing its interest in using the right-of-way for recreational purposes. From 1986, until the commencement of this action, the State and the Black Hills Rails-to-Trails Association have taken steps to negotiate and, eventually, develop the right-of-way of Burlington Northern into recreational trails.

The right-of-way has not been used by the railroad company since January 13, 1984. Burlington Northern has removed all of its personal property from the corridor, including rails, ties, and bedding materials. The company has also arranged for the removal of trestles and bridges and a number of trestles and bridges have, in fact, been removed.

APPLICABILITY OF 43 USC 912 TO THE RIGHT-OF-WAY GRANTED TO BURLINGTON NORTHERN RAILROAD COMPANY UNDER THE GENERAL RAILWAY RIGHT-OF-WAY ACT OF 1875, 43 USC 934.

The Plaintiffs argue that 43 USC 912 does not apply to rights-of-way granted by the United States under the General Right-of-Way Act of 1875, 43 USC 934, because these rights-of-way were granted as easements only. The relevant portion of section 912 reads as follows:

> Whenever public lands of the United States have been . . . granted to any railroad . . . and use and occupancy of said lands for such purposes has ceased . . . whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by an Act of Congress, then and thereupon all right, title, interest and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person . . . or successors in title and interest to whom title of the United States may have been or may be granted . . .

The Defendant-Intervenor, State of South Dakota, asserts that Section 912 is applicable to this case since the right-of-way was federally granted and federal statutes governing abandonment of railroad rights-of-way should control. In support of its contention, the State relies upon *State of Idaho v. Oregon Short Line Co.*, 617 F.Supp. 207 (D. Idaho 1985). In *State v. Oregon Short Line*, a county and two cities sought to have the district court declare that the railroad company defendants had abandoned a portion of property within the boundaries of the county and cities, as required under 43 USC 912. The adjoining landowners, in that action, contested the applicability of section 912 arguing that the section applied only to pre-1871 rights-of-way and not to 1875 rights-of-way. The district court, however, found section 912 applicable to the 1875-granted right-of-way, after an extensive review of the legislative history of the statutes and relevant caselaw. *Id.*, at 212.

Similar to the landowners' argument in *State v. Oregon Short Line*, the Plaintiffs here attempt to distinguish pre-1871 and 1875 rights-of-way. Plaintiffs cite to the case of *City of Aberdeen v. Chicago and Northwestern Transportation Co.*, 602 F.Supp. 589 (DC SD 1984), to support their argument that 43 USC 912 does not apply to rights-of-way granted under the provisions of the 1875 General Railway Right-of-Way Act. In *City of Aberdeen*, the city brought an action against defendants railroad company and individuals who were successors in title to the strip of land in question. The city claimed title to the piece of land which was located within municipal boundaries. Upon examination of the federal statutes involved and its

interpretation of the Supreme Court case of *Great Northern Railway Company v. United States*, 315 US 262, 62 S.Ct. 529, 86 L.Ed. 836 (1942), the district court agreed with the Defendants that section 912 was inapplicable to the case at hand. According to the district court in *City of Aberdeen*, rights-of-way granted under the 1875 Act after 1871 were mere easements. Consequently, when the railroad ceases using the right-of-way for railroad purposes, the easement disappears and the underlying landowners succeed to the interest of the original patentee. *Id.*, at 593.

After review of the federal statutes and cases, this Court finds that 43 USC 912 is applicable to rights-of-way granted to railroads under the 1875 General Railway Right-of-Way Act, 43 USC 934. In making this decision, this Court has found that *State v. Oregon Short Line* as more persuasive in its discussion of the applicability of section 912. This Court is also not convinced, as perhaps was the district court in *City of Aberdeen*, that the Supreme Court in *Great Northern* totally disregarded statutes enacted by Congress that were intended to dispose of abandoned railroad rights-of-way. Rather, the court, in *Great Northern*, limited its holding to the type of interest a railroad acquired under the 1875 Act and did not discuss 43 USC 912 at all. 315 US at 270-72, 62 S.Ct. at 532-33.

Congress enacted three statutes in the 1920's to dispose of the interest the United States retained in the 1875 Act rights-of-way. Section 912, 43 USC 913 and 23 USC 316 seemingly evince an intent by Congress that railroad rights-of-way would continue to be used for public transportation purposes following abandonment by the railroads. *State v. Oregon Short Line*, at 212. Whether the 1875 Act rights-of-way are termed "easements" or "rights-of-

way," cannot be a basis upon which this Court will ignore Congressional intent and find 43 USC 912 inapplicable to these rights-of-way.

APPLICATION OF 43 USC 912 TO THE RIGHT-OF-WAY HELD BY BURLINGTON NORTHERN RAILROAD COMPANY.

This Court agrees, with the State, that the right-of-way held by Burlington Northern Railroad Company has not been legally abandoned as required under the provisions of 43 USC 912 since there has not yet been a decree or declaration of abandonment by either a court of competent jurisdiction or an act of Congress.

The Plaintiffs concur that no court has entered a decree or declaration of abandonment, but assert that the actions of the ICC, in issuing a certificate of abandonment to Burlington Northern Railroad Company, qualifies as the requisite act of Congress. This Court does not doubt that the ICC has been delegated the authority to permit abandonments of rail lines and services, *Chicago & NW Tr. Co. v. Kalo Brick & Tile*, 450 US 311, 67 L.Ed.2d 258, 267, 101 S.Ct. 1124 (1981), and that the ICC did exercise that authority when it issued a certificate and decision of abandonment to Burlington Northern on September 9, 1983. However, the Court does not find support for the proposition that these actions of ICC meets the requisite "Act of Congress," as required under 43 USC 912.

The language of the statute and federal regulations that give the ICC authority to permit abandonments clearly do not extend that authority to determine the disposition of railroad rights-of-way. 49 USC 10903, 49

CFR Part 1152 et seq. The relevant language of the federal statute that delegates the ICC jurisdiction over rail abandonments states:

> Rail carriers, subject to the jurisdiction of the Interstate Commerce Commission . . . may abandon any part of its railroad *lines* only if the Commission finds that the present or future public convenience and necessity require or permit abandonment . . . (emphasis provided).

49 USC 10903.

The ICC certificate and decision issued to Burlington Northern on September 9, 1983, is also indicative of the limited authority of the Commission. In its decision, the ICC certified that " . . . the present and future public convenience and necessity permit the abandonment by Burlington Northern Railroad Company of its *line* of railroad . . . " See Plaintiffs' Exhibit "B", ICC Certificate and Decision, Docket No. AB-6 (Sub-No. 162), September 9, 1983.

The cases offered by the Plaintiffs do not extend such authority to the ICC to permit abandonments of railroad rights-of-way. In *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile*, 450 US 311, 321, 67 L.Ed 2d 258, 267 (1981), the Supreme Court discussed the exclusive and plenary authority of the Commission to rule on carrier's decisions to abandon lines, but it did not go so far as to include authority of the ICC over the rights-of-way. Other courts that were presented with this issue have rejected that the ICC has authority over right-of-way abandonments. In *State by Washington Wildlife Preservation v. State*, 329 NW2d 543, 548 (Minn. 1983), the court found no merit to the argument that abandonment of the right-of-way

occurred when the ICC issued an abandonment certificate. Likewise, in *Vieux v. County of Alameda*, 695 F.Supp. 1023 (ND Cal. 1987), the district court held that the ICC's approval of the railroad's notice of exemption for a relocation project, under which a railroad would abandon its line, did not amount to a congressional decree of abandonment under 43 USC 912.

An abandonment of Burlington Northern Railroad's right-of-way requires, under section 912, that there be (1) a cessation of use and occupancy; and (2) a decree by a court or a congressional act that an abandonment has occurred. *State of Idaho v. Oregon Short Line R. Co.*, 617 F.Supp. 213, 218 (D. Idaho 1985). In the case of Burlington Northern Railroad, there has been a cessation of use and occupancy of its right-of-way. The Plaintiffs and State agree that there has been an abandonment-in-fact, where the railroad has abandoned its lines and services, has removed the trestles and other property underlying its tracks and has, otherwise, indicated an intent to abandon its right-of-way.

While Burlington Northern Railroad Company has met the first requirement of abandonment under the *State v. Oregon Short Line* test, it has yet to obtain a decree by a court or a congressional act that an abandonment has occurred. It is, therefore, by the date of this decision, that Burlington Northern Railroad is deemed to have abandoned its right-of-way running from Custer to Deadwood, South Dakota and it is also, from this date, that the title or interest in the lands that are a part of the right-of-way can be disposed of under the provisions of 43 USC 912.

In determining the reversionary rights of the parties involved in this action, state law is applicable. *National Wildlife Federation v. ICC*, 850 F.2d 694, 703 (DC Cir. 1988). In this State, the applicable statute, SDCL 49-16A-115, operates pursuant to 43 USC 912, which would give no reversionary rights to the adjoining landowners until one year has passed, during which time, the State may establish a public highway. What constitutes a "public highway," for purposes of section 912, would not seem to be an appropriate determination for this Court, at this time, since it is only now that the statute begins to operate. However, it would be this Court's opinion that Congress intended that the railroad rights-of-way be developed for public use. That abandoned rights-of-way would be appropriately developed into recreational trails is reinforced by Congress' enactment of the National Trails Systems Improvement Act of 1988, 18 USC 1248, which, in effect, establishes a rails-to-trails provision. This statute, which also refers to section 912, would further indicate a recognition by Congress that a "public highway" would not exclude use of a railroad right-of-way for trails.

Finally, it is this Court's determination that the Plaintiffs would not be entitled to compensation for a "taking" provided for under the South Dakota Constitution. Under 43 USC 912 and SDCL 49-16A-115, the reversion rights of the servient estate (the Plaintiff landowners) would not come into being until one year has passed from the date of this decree. Since the State has not taken any property of the landowners, they would not be entitled to due compensation.

The counsel for the Defendant Intervenor, State of South Dakota, will prepare the appropriate Findings and Conclusions incorporating this Memorandum Decision, therein.

Sincerely Yours,

/s/ Merton B. Tice, Jr.
MERTON B. TICE, JR.
Circuit Court Judge

MBT:cms

Seventh Judicial Circuit Court

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RE: Barney et al v. Burlington Northern Railroad
Court File No. 88-373

Gentlemen:

This matter is before the Court on Plaintiffs' objections to the State's proposed Summary Judgment and Order and request for reconsideration concerning this Court's previous determinations that (1) the Interstate Commerce Commission was not delegated congressional authority to declare railroad rights-of-way abandoned under 43 U.S.C. 912 and (2) railroad rights-of-way are distinguishable from rail lines for section 912 purposes.

This Court, after having considered the arguments set forth by the parties in this matter and in light of the 9th Circuit Court's decision of *Vieux v. Eastbay Regional Park*, 893 F.2d 1558 (9th Cir. 1990), continues to find that an Interstate Commerce Commission's decision permitting a railroad to abandon its lines is not tantamount to a congressional act declaring a right-of-way abandoned as required under 43 U.S.C. 912. The court in *Vieux*, as did this Court, followed the abandonment test enunciated in *Idaho v. Oregon Short Line R.R. Co.* (Idaho II), 617 F.Supp. 213, 216-18 (D.Idaho 1985), for determining when a railroad has abandoned its right-of-way. In deciding whether adjoining landowners' reversionary rights have vested under 912, the railroad must (1) cease "use and occupancy" of the right-of-way and (2) the abandonment must be declared or decreed by a court of competent jurisdiction or a congressional act. Id. Although the court, in *Vieux*, was concerned with a notice of exemption from the Interstate Commerce Commission, rather than a decision of abandonment, the court discussed and recognized that section 912 requires an act of Congress, i.e. a bill passed by Congress declaring a railroad right-of-way abandoned, or a court decree declaring the right-of-way in question abandoned. In the present case, since there was no congressional act declaring Burlington Northern Railroad's rights-of-way abandoned, it was incumbent upon this Court to declare the rights-of-way in question abandoned, as required by 43 U.S.C. 912.

This Court's determination that there is a distinction between rail lines and rights-of-way was clearly appropriate and necessary to follow the mandate of 43 U.S.C. 912. While the State may have used the terms, "rail lines"

and "rights-of-way" interchangeably, the relief sought by the State, as was evidenced from the State's pleadings, on the whole, was a decree of abandonment of Burlington Northern's rights-of-way, as required under the above statute. With the support of the facts of this case, as well as the law, this Court appropriately granted the relief it deemed the State was entitled to. SDCL 15-6-54(c). *Bank of Toronto v. Lengkeek*, 436 N.W.2d 271 (SD 1989), Baldwin v. First Bank of Black Hills, 362 N.W.2d 85 (SD 1985).

Another related issue that has been brought to the Court's attention is the establishment of public highways within one year. Under the federal statute 43 U.S.C. 912, the State must "legally establish a public highway" within one year from the date of this Court's decree of abandonment. Two questions have arisen in regard to this requirement. First, whether the recreational trail, as proposed by the State, is a public highway for 912 purposes, and second, whether the State has legally established a public highway.

In finding that a recreational trail is a public highway, the Court relies, in part, upon interpretation of the statutory definitions of "highway." By statute, a "highway" includes every way that is open to the public and used for vehicular travel. SDCL 3-1-1 and 32-14-1(a). The trail, as proposed by the State, meets the statutory requirements. The trail is clearly a way open to the public and does allow travel by means of bicycles and snowmobiles which are considered "vehicles" under State traffic laws. See SDCL 32-14-1, *Finch v. Christiansen*, 172 N.W.2d 571 (SD 1969), *Montgomery v. Dept. of Natural Resources*, 432 N.W.2d 414 (Mich.App. 1988).

A way, such as the right-of-way at issue here, is not any less a public highway because it is to be used for purposes of pleasure and recreation only. 39 Am.Jur.2d Highways, Streets and Bridges 1, p. 402. Furthermore, the federal statutes encouraging railroad rights-of-way be developed into recreational trails is an indication that the rights-of-way granted to Burlington Northern Railroad are not limited to railroad use or for use as a paved roadway for motorized travel. See 49 U.S.C.A. 10906. Courts have also acknowledged that highways encompass all kinds of public ways used for travel, including roads, streets, bridges, alleys, lanes, and trails. In *State by Washington Wildlife Preservation v. State*, 329 N.W.2d 543 (Minn. 1983), the court, in holding that a trail can be considered a public highway, quoted *Carter v. Northwestern Telephone Exchange Co.*, 63 N.W. 111, 112 (Minn. 1895):

> "If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising [the public] easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and next, a way for vehicles drawn by animals . . . And thus the methods of using public highways expanded with the growth of civilization, until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the

> utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use." Id. at 546-47.

The decision of *Vieux v. Eastbay Regional Park, supra,* also supports this Court's determination that a public highway was legally established by the State of South Dakota as required under section 912. In *Vieux,* the court described how the California common law of dedication determines when a public highway is legally established. In California, dedication occurs "where a county is granted and accepts a right-of-way as a county highway." Id. at 1570. It is the act of "grant and acceptance" of the right-of-way that constitutes a dedication of the strip for county road purposes. No improvements are necessary to make the right-of-way a highway. Id., citing *Venice v. Short Line Beach Land Co.,* 181 P. 658, 659 (1919).

In South Dakota, a public highway is also legally established by dedication. Dedication may be express, as when made by oral declaration, or by deed; or it may be implied, as when there is an acquiescence in a public use. See *Brown v. Pennington Co. Brd. of Commissioners,* 422 N.W2d 440 (SD 1988), 23 Am.Jur.2d Dedication 1. In either type of dedication, the courts look to the actual intent to dedicate the land to public use and although evidence of that intention can not be shown by mere use it can be shown by deed, words, or acts. SDCL 31-3-2. *Smith v. Sponheim,* 399 N.W.2d 899 (SD 1987), *Roche Realty & Investment Co. v. Highlands Co.,* 135 N.W. 684 (SD 1912).

In the present case, dedication both express and implied, has occurred. The Burlington Northern Railroad Company and the State of South Dakota have entered into several agreements whereby the railroad company granted the State its right, title and interest in the rights-of-way running from Custer to Deadwood, South Dakota. The railroad company has further expressed its intent to grant these rights-of-way to the State through quitclaim deeds. The State not only accepted the rights-of-way through the agreements and deeds, but has actively pursued acquisition of the rights-of-way by intervening in this action and seeking necessary funding to purchase the rights-of-way. The State's further involvement in developing the recreational trail is evidence of its intent to establish a public highway.

All of these acts taken by Burlington Northern Railroad and the State of South Dakota to dedicate the rights-of-way in question occurred between the dates of April 15, 1988, and August 31, 1989. Consequently, it was during this period that the State has "legally established a public highway" as required under 43 U.S.C. 912.

Counsel for the Defendant-Intervenor, State of South Dakota, please submit the appropriate Findings of Fact and Conclusions of Law, incorporating this Memorandum Decision, therein.

Sincerely Yours,

/s/ Merton B. Tice, Jr.
MERTON B. TICE, JR.
Circuit Court Judge

MBT:cms

(2)

Supreme Court, U.S.
FILED
JAN 7 1993
OFFICE OF THE CLERK

No. 92-991

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

FLORENCE L. KAUBISCH, ET AL.

Petitioners,

v.

STATE OF SOUTH DAKOTA,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of the State of
South Dakota

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

WHETHER 43 U.S.C. § 912 APPLIES TO RIGHTS-OF-WAY GRANTED UNDER THE GENERAL RIGHT-OF-WAY ACT OF 1875 (43 U.S.C. § 934) AND TO THE REVERSIONARY RIGHTS OF THE PETITIONERS.

II

WHETHER AUTHORITY TO ABANDON A RAILROAD RIGHT-OF-WAY GRANTED BY THE INTERSTATE COMMERCE COMMISSION CONSTITUTES AN ACT OF CONGRESS UNDER 43 U.S.C. § 912.

III

WHETHER THE UNITED STATES, FOR PURPOSES OF 43 U.S.C. § 912, POSSESSES ANY "RIGHT, TITLE, INTEREST, AND ESTATE" IN LANDS OVER WHICH A RIGHT-OF-WAY HAS BEEN GRANTED UNDER THE GENERAL RIGHT-OF-WAY ACT OF 1875 WHEN THE UNITED STATES, SUBSEQUENT TO THE RIGHT-OF-WAY GRANT, HAS CONVEYED, WITHOUT RESERVATION, FEE TITLE TO THE UNDERLYING LAND.

IV

WHETHER A RECREATIONAL BICYCLE TRAIL CONSTITUTES A PUBLIC HIGHWAY FOR PURPOSES OF 43 U.S.C. § 912.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	11
REASONS FOR DENYING THE WRIT	14
1. THERE IS NO CONFLICT ON APPLICATION OF § 912 TO 1875 ACT CORRIDORS BETWEEN THE DECISION BELOW AND THOSE OF OTHER APPELLATE COURTS.	18
2. THERE IS NO CONFLICT ON WHETHER ICC ACTIONS CONSTITUTE ACTS OF CONGRESS BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR FEDERAL COURTS OF APPEALS.	23
3. THERE IS NO CONFLICT ON WHAT CONSTITUTES A PUBLIC HIGHWAY FOR § 912 PURPOSES BETWEEN THE CASE BELOW AND ANY CASE CITED BY THE PARTIES.	28

4. PETITIONERS HAVE NOT SHOWN AN ISSUE OF NATIONAL IMPORT. 30

CONCLUSION 31

TABLE OF AUTHORITIES

CASES:	PAGE
Allard Cattle Company v. Colorado and Southern Railway Company, 516 P.2d 123 (Colo. App. 1973)	18
Barney v. Burlington Northern, 490 N.W.2d 726 (1992)	1, 11
City of Aberdeen v. Chicago & North Western Transp. Co., 602 F.Supp. 589 (D.S.D. 1984)	21
Haack v. Burlington Northern, 28 S.D. L.Rev. 196 (1982)	3
Harris v. Ski Park Farms, Inc., 62 Wash.App. 371, 814 P.2d 684, pet. for rev. granted, 118 Wash.2d 1001, 822 P.2d 684 (1991)	24
Idaho v. Oregon Short Line Railroad Company, 617 F.Supp. 208 (D. Id. 1985)	PASSIM
Preseault v. ICC, 110 S.Ct. 914	11, 15, 16
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	16
State by Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543 (Minn. 1983), cert. denied, 463 U.S. 1209 (1983)	10, 11
Stegman v. City of Fort Thomas, 273 Ky 309, 116 S.W.2d 649 (1938)	30

Vieux v. East Bay Regional Park District, 906 F.2d 1330 (9th Cir.), cert. denied, 111 S.Ct. 430 (1990) 17, 18, 22, 23

White v. Meadow Park Land Co., 249 Mo.App. 683, 213 S.W.2d 123 (1948) 30

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 16

STATUTORY REFERENCES:

S.D. Codified Laws Ann. § 49-16A-115 8, 9, 11

16 U.S.C. § 1247(d) 15

23 U.S.C. § 316 6, 7, 20, 31

43 U.S.C. § 912 PASSIM

43 U.S.C. § 913 PASSIM

43 U.S.C. § 934 2

OTHER AUTHORITIES:

61 Cong. Rec. H4496 (August 1, 1921) 19, 20

Cong. Rec. H8046 (May 31, 1920) 27

H.R. Rep. No. 851, 66th Cong., 2d Sess. 1, 2, 3 (1920) 26

S.Rep. No. 388, 67th Cong., 2d Sess. 1 (1922) 19

NO. 92-991

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1992

FLORENCE L. KAUBISCH, ET AL.,

Petitioners,

v.

STATE OF SOUTH DAKOTA,

Respondent.

Respondent State of South Dakota respectfully requests that this Court deny the petition for writ of certiorari sought by Petitioners Kaubisch, et al., seeking review of the decision and judgment of the South Dakota Supreme Court in Barney v. Burlington Northern, 490 N.W.2d 726 (1992).

STATEMENT OF THE CASE

This proceeding involves an historic rail corridor in the Black Hills of South Dakota, passing many points of interest and terminating in Deadwood.[1] The corridor was granted to Burlington Northern's predecessors in interest in the 1880's, principally under the General Right-of-Way Act of 1875, 43 U.S.C. § 934.[2] The railroad corridor was operated as a railroad subject to the supervision of the Interstate Commerce Commission (ICC), including ICC's abandonment jurisdiction. Burlington Northern Railroad

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[1] Cf. Burlington Northern Railroad Company -- Abandonment Exemption -- Fall River and Custer Counties, SD, AB-6 (Sub-no. 293X), served Jan. 4, 1989 (unpublished but available via Lexis-Trans library) (discussing ICC efforts to comply with National Historic Preservation Act in connection with the portion of the line between Edgemont and Custer).

[2] The General Railroad Right-of-Way Act was repealed by Pub.L. No. 94-579, 90 Stat. 2793 (1976).

(BN) obtained abandonment authorization from the ICC for the portion of the corridor involved in this proceeding in 1983. The State owns over one thousand miles of rail corridor. Some of this mileage is in use and some of it is being retained for possible future use. The State entered into negotiations to acquire the corridor in the Black Hills. Because the corridor was federally-granted, the State and BN acted pursuant to 43 U.S.C. § 912,[3] which governs the disposition of federally-granted rail corridors upon cessation of current rail use.

Insofar as relevant here, 43 U.S.C. § 912 provides that the owner of the legal subdivision traversed by a federally-granted

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[3]Additionally, South Dakota law relating to federally-granted corridors mirrors the provisions of 43 U.S.C. § 912 for disposition of such corridors upon cessation of rail use. SDCL 49-16A-115. See generally Note, Reversion of Railroad Right of Way in South Dakota after Haack v. Burlington Northern, 28 S.D. L.Rev. 196 (1982).

railroad right of way shall be "vested" with the landowner[4] but only (1) upon a declaration by a court of competent jurisdiction that the railroad has been abandoned or an Act of Congress declaring forfeiture, and then (2) only if a "public highway" is not established on the premises within one year of the judicial declaration or Act of Congress.[5] Other statutes --

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[4]If the railroad right of way is within the corporate limits of a municipality, 43 U.S.C. § 912 provides that the municipality acquires the land.

[5]43 U.S.C. § 912, certainly one of the longer sentences in the U.S. Code, provides as follows:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and

(continued...)

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[5](...continued)
thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or (sic) forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assistance of any kind or nature whatsoever: Provided, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance is among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any

(continued...)

specifically 43 U.S.C. § 913 and 23 U.S.C. § 316 -- have long permitted federally-granted railroad rights of way to be used for any "public highway" purposes with the consent of the railroad prior to abandonment.[6]

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[5](...continued)
public highway on said right of way on March 8, 1922: Provided further, That the transfer of said lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

[6]43 U.S.C. § 913 provides as follows:

> All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any state, county or municipality any portion of such right of way to be used as a public highway or street: Provided, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than 50 feet on

(continued...)

Pursuant to 43 U.S.C. § 912, and prior to any judicial declaration of abandonment or Act of Congress signifying a forfeiture, the State acquired the Black Hills railroad corridor for "public highway" purposes as provided in 43 U.S.C. §§ 912 and 913, and 23 U.S.C. § 316.

In the proceeding below, several landowners adjacent to the corridor asserted ownership interests in parcels within the corridor, arguing that rail use of the corridor had ceased and the parcels had automatically reverted to them notwithstanding 43 U.S.C. § 912 and applicable state law. In October of 1987, several such owners filed a quiet title action in State court, asserting ownership of several parcels in the corridor. The State of South Dakota intervened. The

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[6](...continued)
each side of the center of the main track of the railroad as now established and maintained.

parties agreed that there were no genuine issues of material fact in this matter, which would permit the case to be summarily resolved. On motion for summary judgment, the Circuit Court of the Seventh Judicial Circuit found that 43 U.S.C. § 912 was applicable; that there had heretofore been no declaration or decree of forfeiture or abandonment by a court or Congress; and that the adjacent owners' alleged reversionary interest did not vest because the State had developed a "public highway" on the corridor within the one year period provided by § 912 and the applicable State statute, S.D. Codified Laws Ann. § 49-16A-115.

In an opinion filed September 9, 1992, the South Dakota Supreme Court unanimously affirmed the trial court's rulings. The Court found that (a) federal law governed the construction of the interest conferred on railroads under the 1875 Right of Way Act, (b)

43 U.S.C. § 912 applied to that interest, (c) § 912 specifically provides that adjacent owners have no vested "reversion" until a judicial declaration of abandonment or a Congressional Act determining forfeiture and then only if a "public highway" had not been established within one year. South Dakota's highest Court also found and affirmed that the State had established a "public highway" before or within the requisite one year period.

South Dakota statutory law mirrors the federal scheme of disposition provided in 43 U.S.C. § 912. In particular, S.D. Codified Law Ann. § 49-16A-115 provides for disposition of federally-granted corridors under § 912. Since the rail corridor in the proceeding below had been preserved in accordance with 43 U.S.C. § 912 and its State counterpart, the South Dakota Supreme Court ruled that the adjacent landowners were not entitled to any

compensation on the theory that their reversionary interest in parcels within the rail corridor had somehow been "taken."

The South Dakota Supreme Court also adopted the reasoning of the Minnesota Supreme Court in State by Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543, 546 (Minn. 1983), cert. denied, 463 U.S. 1209 (1983). The court below held that since a railroad is one kind of public highway, and use of a rail corridor for another public highway purpose is "compatible and consistent with its prior use as a public highway." Thus,

> [n]o greater burden has been placed on the servient estate. 'It has long been held that the holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in aid of the general purpose of which the easement was acquired are permissible.'

Barney v. Burlington Northern, 490 N.W.2d at 733, quoting Washington Wildlife, supra, 329 N.W.2d at 546. This portion of the South Dakota Supreme Court's decision serves as a State law ground, in addition to 43 U.S.C. § 912 and S.D. Codified Law Ann. § 49-16A-115, for allowing use of the rail corridor as a public highway. It is not challenged or otherwise questioned in the petition for certiorari filed herein.[7]

SUMMARY OF ARGUMENT

There is no conflict among the circuits nor federal question of magnitude sufficient to warrant invocation of this Court's

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[7]In Preseault v. ICC, 110 S.Ct. 914, 924 (1990), this Court unanimously recognized that "[s]ome state courts have held that trail use does not constitute abandonment of a right-of-way for public travel so as to trigger reversionary interests" citing, inter alia, Washington Wildlife, supra, 329 N.W.2d 543, 545-48, also indorsed by the South Dakota Supreme Court. See also Preseault, supra, 110 S.Ct. at 926 (concurring opinion of Justice O'Connor referencing Washington Wildlife).

jurisdiction. Petitioners do not challenge the constitutionality of the relevant federal statute -- 43 U.S.C. § 912 -- or its application here. They merely raise issues of statutory construction, not of constitutional dimension, on which there is no conflict among appellate courts in this country. In any event, in light of the independent State law basis for the decision, even if all the federal questions were resolved contrary to the unanimous opinions of the other federal appellate or state supreme courts that have considered them, the result would not change.

There are three basic issues relating to the construction of 43 U.S.C. § 912 embodied in the four questions framed by Petitioners: (1) whether 43 U.S.C. § 912 applies to 1875 Act corridors, (2) whether ICC abandonment authorization amounts to a judicial declaration or Act of Congress, and (3) whether recreational trails can be "public

highways." Petitioners' position on these issues lacks merit.

43 U.S.C. § 912 on its face is applicable to all federally granted railroad rights of way, including 1875 Act corridors. This conclusion is supported by all federal courts of appeals or state supreme courts that have considered the issue. It is also consistent with the construction of 43 U.S.C. § 912 most recently adopted by the Solicitor of the United States Department of the Interior.

Similarly, all state courts of last resort and federal courts of appeals that have considered the issue concur that an ICC abandonment authorization does not constitute a judicial declaration or Act of Congress for purposes of triggering the vesting of reversionary interests under 43 U.S.C. § 912. ICC merely authorizes an abandonment; its abandonment license is permissive, not determinative. In contrast, a judicial

declaration or Congressional Act as envisioned in 43 U.S.C. § 912 is determinative.

Finally, a "public highway" is unequivocally broad enough to encompass pedestrian or equestrian facilities open to the general public for transit purposes, both under the law of South Dakota and common and statutory law generally. Until the advent of the railroad in the mid-1800's, all land-based public highways (including those that were federally funded) were pedestrian/equestrian facilities. Certainly the concept of public highway includes facilities, such as that envisioned here, which will also support motorized snowmobiles and maintenance equipment.

REASONS FOR DENYING THE WRIT

Under Supreme Court Rule 10.1, a petition for certiorari "will be granted only when there are special and important reasons therefor." Petitioners have cited no special

or important reasons. The gravamen of their argument is a syllogism as follows: (a) conserving rail corridors is "increasingly popular,"[8] (b) this Court considered the application of the 1983 Trails Act Amendments (in particular, 16 U.S.C. § 1247(d)) in Preseault v. ICC, 110 S.Ct. 914, (c) 43 U.S.C. § 912 also permits preservation of corridors, and (d) this Court therefore should have a look at § 912. Cert. pet. at 7. This hardly is a demonstration of significance for purposes of review.

Petitioners do not challenge the constitutionality of 43 U.S.C. §§ 912 or 913, either in the abstract or as applied. If they

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[8]Preservation has always been important in agricultural states such as South Dakota, which have been hard-pressed by thousands of miles of ICC abandonment authorizations threatening present and future transport of agricultural commodities. South Dakota has responded in part with acquisition of over 1000 miles of rail corridor for current or future operation, or for other public highway purposes.

did, no such challenge would be credible.[9] Eschewing any frontal assault on 43 U.S.C. §§ 912 and 913, Petitioners have adopted the limited position that 43 U.S.C. § 912 is

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[9]43 U.S.C. §§ 912 and 913 are within the power of Congress under the Commerce Clause under the reasoning of this Court in Preseault, supra, 110 S.Ct. at 924-25. Additionally, other Constitutional provisions could be invoked for this Congressional action. The legislative history behind 43 U.S.C. 912 makes clear that Congress was vitally concerned that federally-granted rail corridors be preserved for all "public highway" purposes, even if non-rail. As corridors become increasingly difficult to assemble in our growing nation, and as more and more rail corridors have been threatened with loss, Congress has adopted measures reaffirming the desirability of retaining rail corridors for other transportation purposes, and for future rail use, through such statutes as 16 U.S.C. § 1247(d) (adopted in 1983), and 16 U.S.C. § 1248(c)-(g) (adopted in 1988).

In the doubtful circumstances where application of 43 U.S.C. §§ 912 and 913 could result in a "taking," the Tucker Act, 28 U.S.C. §§ 1491(a) & 1346(a)(2), is presumptively applicable to provide a "just compensation" remedy. E.g., Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-95 (1985).

constructively inapplicable here. They have attempted to conjure up conflicts in decisions on two issues involving the application of § 912, which they argue warrant review. On the third issue (scope of the term "public highway"), they have thus far not even attempted to articulate a conflict.

Petitioners' purported conflicts are more illusory than real. The leading federal appellate decision considering § 912 is Vieux v. East Bay Regional Park District, 906 F.2d 1330 (9th Cir.), cert. denied, 111 S.Ct. 430 (1990). That decision is fully in accord on the relevant issues addressed by the South Dakota Supreme Court below. In particular, the Ninth Circuit determined (1) 43 U.S.C. § 912 applies to 1875 Act rail corridors and (2) an ICC abandonment authorization does not constitute a judicial determination of actual abandonment, or an Act of Congress triggering

the final one year period for establishment of a public highway under § 912.

1. There is no conflict on application of § 912 to 1875 Act corridors between the decision below and those of other appellate courts. The South Dakota Supreme Court's determination that 43 U.S.C. § 912 applies to 1875 Act rights of way is consistent not only with Vieux, supra, but also with the views of all other appellate courts that have addressed the issue. E.g., Allard Cattle Company v. Colorado and Southern Railway Company, 516 P.2d 123, 125 (Colo. App. 1973).

Section 912 on its face applies to all federally-granted rail corridors. Congress did not distinguish pre-1875 Act from 1875 Act rail lines. Whether 1875 Act, or pre-1875, Congress provided for use of all federally-granted rail corridors for other public highway purposes. The relevant legislative history states categorically that Congress

wanted to "safeguard" the "right . . . to establish highways on such [rail corridors] as may be abandoned in the future." S.Rep. No. 388, 67th Cong., 2d Sess. 1 (1922). Congressman Burtness explained that the intent was to permit the land to "revert" to the person "who already received the patent on the entire legal subdivision [but] [w]ith this exception, namely, that the Committee put in an amendment . . . that will save the use of these rights of way for public highways." 61 Cong. Rec. H4496 (August 1, 1921). Congressman Burtness explained that

> The gentlemen will readily realize that in some cases where the railroad has been actually established and then abandoned it makes a very good foundation for a public highway.
>
> Members of the committee knew of several such cases, so realizing that highways were of public importance they made an exception in the bill, so that any part that is used for a public highway is expressly reserved. Likewise it gives to the public authorities in charge of the establishment of

> highways the opportunity to establish a legal highway thereon within one year after the decree or forfeiture or abandonment.

Id. at 4496.

This construction of 43 U.S.C. § 912 compares favorably with the two most closely related statutes, 43 U.S.C. § 913 and 23 U.S.C. § 316. These two provisions, adopted almost three quarters of a century ago, authorize establishment of other public highways in federally-granted rail corridors. No one has heretofore taken the position that these latter statutes do not apply to 1875 Act corridors, which constitute the bulk of federally-granted railroad rights of way. If 43 U.S.C. § 913 and 23 U.S.C. § 316 apply to 1875 Act corridors, but § 912 does not apply, then all public highways located in such corridors are trespassers upon abandonment. This would be a blundering and disruptive

result, as intimated by Congressman Burtness in the legislative history quoted above.

City of Aberdeen v. Chicago & North Western Transp. Co., 602 F.Supp. 589 (D.S.D. 1984), the one case on which Petitioners rely, was predicted on the notion that the 1875 Act conferred only easement-type interests and that once the federal government conveyed the underlying fee, the United States lost all interest in the 1875 Act corridor. The Aberdeen court never considered whether the easement-type interest granted in the 1875 Act was congressionally intended to encompass other transportation uses.

Aberdeen is unique. It is the only reported decision suggesting that 43 U.S.C. § 912 does not apply to 1875 Act corridors. Shortly after Aberdeen was decided, the district court in Idaho v. Oregon Short Line Railroad Company, 617 F.Supp. 208 (D. Id. 1985), explained that the legislative history

of the statute indicated that Congress clearly intended § 912 to be applicable to all federally-granted rail corridors: "Congress clearly believed that it had authority over 1875 Act railroad rights-of-way." 617 F.Supp. at 212. The district court in Oregon Short Line, supra, explained that Congress intended something more than a mere railroad interest in adopting the 1875 Act:

> Even if the 1875 Act granted only an easement, as opposed to a higher right-of-way interest, Congress had authority, by virtue of its broad power over interstate commerce, to grant such easements subject to its own terms and conditions -- which were to preserve a corridor of public transportation, particularly the railroad transportation, in order to facilitate the development of the 'Western vastness.'

Id., 617 F.Supp. at 212.

The Ninth Circuit reinforced this holding in Vieux, supra, decided five years later. The Interior Department, which administers most public lands other than the national

forests, has cited Idaho v. Oregon Short Line Railroad Company, supra, with approval for the proposition that "the 1875 Act anticipated a retained interest in the United States in addition to mineral rights."[10] In short, all appellate decisions as well as the legal position of the relevant administrative agency are consistent with the view that § 912 applies to 1875 Act rail corridors. The decision of the South Dakota Supreme Court comports with Idaho Short Line, Vieux, and the Interior Department's most recent construction of the nature of interests in 1875 Act corridors.

2. There is no conflict on whether ICC actions constitute Acts of Congress between the decision below and the decisions of other state courts of last resort or federal courts of appeals. Petitioners cite one case for the

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[10]Memorandum M-36964, Acting Solicitor to Assistant Secretary, Jan. 12, 1989, at 11.

proposition that an ICC authorization constitutes an "Act of Congress" for purposes of § 912 -- the decision of the Washington Court of Appeals in Harris v. Ski Park Farms, Inc., 62 Wash.App. 371, 814 P.2d 684 (1991). A petition to review that decision was, however, granted by the Washington Supreme Court at 118 Wash.2d 1001, 822 P.2d 684 (1991), and the case, which has been argued, is still awaiting decision.[11] Thus, the ultimate precedential value is not yet clear.

In any event, the reasoning of the state court of appeals is incorrect. That court never examined § 912 in detail, and did not refer to its legislative history. Its only reasoning was that since Congress has granted certain abandonment jurisdiction to ICC, its determinations are the equivalent of an "Act of Congress." ICC may authorize abandonment,

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[11]Tel. conf. Office of Clerk, Olympia, and Charles Montange December 29, 1992.

but for any number of reasons, the abandonment may never be consummated. Some such reasons are sale of the rail line to another freight carrier under ICC jurisdiction; sale of the rail line as a private freight railroad to another company; transfer of the line to a state for operation under ICC's "modified certificate" program; sale of the rail line for passenger service -- which is generally not ICC regulated; use of the rail line for storage of cars; sale of the line for excursion rail use.

The legislative history of § 912 makes clear that Congress wanted "reversions" to be triggered by a formal determination by a court of actual abandonment or an Act of Congress decreeing forfeiture of a charter. Indeed, the pertinent House Report states that the language of the statute was modified

> so it may be clear vesting of title in the landowner and his right to occupy and use the same shall only

> occur after there has been a forfeiture of the right of the railroad company or when an abandonment has been actually ascertained and decreed. The bill [as it previously stood] might [have been] construed to leave the determination of abandonment to the landowner, which is manifestly unworkable.

H.R. Rep. No. 851, 66th Cong., 2d Sess. 1, 2, 3 (1920) (emphasis added). The "reversion" was not to be triggered in some automatic sense whenever a claimant felt he or she was entitled to the property, but only on actual abandonment or forfeiture. The House debate is especially clear on this point:

> MR. GARD. The objection which was in my mind was that without any process by anybody, except the proof of the matter of abandonment, the title to this land vested in some subdivision which was outside a municipality, and simply because a man might own a piece of ground contiguous to this abandoned land, by virtue of the ownership and no other action he became entitled to this abandoned land. It seems to me there ought to be some approval by some one (sic) who has charge of the land rather than have the automatic addition to the man's own land.

> MR. CHRISTOPHERSON. This does not do that automatically. The bill was originally drawn so that it would automatically do it, but by the suggestion of the department there was a committee amendment which has been submitted by the committee and which I will read --
>
> > Whether by forfeiture or by abandonment by said railroad company, declared or decreed by a court of competent jurisdiction or by act of Congress.
>
> With that amendment, the parties would either have to go into court and get a decree declaring the land forfeited in a competent court or by special act of Congress. . . .

59 Cong. Rec. H8046 (May 31, 1920) (emphasis added).

Since an ICC authorization for abandonment is merely permissive and neither requires a line to be abandoned, nor constitutes a determination that a line in fact is abandoned, it has nothing to do with the "Act of Congress" language in § 912. Interestingly, in Idaho v. Oregon Short Line

Railroad, supra, the district court held that § 912 applies to 1875 Act corridors. In a companion case the same district court held that even though ICC had authorized an abandonment, the line was not abandoned for purposes of § 912 because the railroad was continuing to use the corridor for side track and storage purposes. Idaho v. Oregon Short Line, 617 F.Supp. 213 (D. Id. 1985). In short, there is clearly a distinction between an ICC authorization and a determination of actual abandonment or forfeiture by a court or Act of Congress.

3. There is no conflict on what constitutes a public highway for § 912 purposes between the case below and any case cited by the parties. Petitioners do not suggest any conflicts with the definition of "public highway" used by the South Dakota Supreme Court. They also fail to articulate any rationale why the definition should be

other than that used by the court below. All authorities that have considered the question adhere either to local state law as determining what constitutes a public highway, or to the common law definition of public highway. As the South Dakota Supreme Court held, the facility South Dakota is establishing on the rail corridor readily meets South Dakota's definition of a "public highway." The common law definition -- indeed, the dictionary definition -- is any way open to the public.[12] In the court below, Respondent understood Petitioners to argue that "public highways" could not be primarily recreational. There are, however, many public highways, particularly in a tourist area such as the Black Hills, that are primarily recreational. Even railroads have

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[12] E.g., Webster's New Collegiate Dictionary at 536 (1981); Black's Law Dictionary 656 (5th ed. 1979).

been built primarily for recreational purposes. There is no "non-recreational" implied limitation on the term "public highway."[13]

4. Petitioners have not shown an issue of national import. In light of the argument set out above, it is plain that the issue of interpretation of 43 U.S.C. § 912 is not of great importance at this time. No other appellate courts of last resort or federal courts of appeals have taken a contrary position, and the issue has been infrequently litigated. It may be that this case

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[13] E.g., Stegman v. City of Fort Thomas, 273 Ky 309, 116 S.W.2d 649, 651 (1938) ("a street use only by pedestrians is a public highway"); White v. Meadow Park Land Co., 249 Mo.App. 683, 213 S.W.2d 123, 125 (1948) (chief criterion of public highway is that it is a transportation route available to public at large). "The term 'highway' is generic and includes all public roads and ways. . . . A way is not any less a public highway because it is to be used for purposes of pleasure and recreation only." 39 Am.Jur.2d section 1, at pp. 401 & 402.

constitutes the only real test of 43 U.S.C. § 912 as a vehicle for "Rail to Trail" conversions. The statute might eventually be of importance in such cases, or it might not. Even if this Court believes that it may ultimately have to resolve the issue, the law ought to be permitted to develop beyond the point where there are only a handful of cases, all of which are in agreement with the decision below.

CONCLUSION

There is no conflict between the circuits or state courts of last resort on the issues decided by the South Dakota Supreme Court below. That decision is consistent with the leading federal decisions. Further, the State's highest court has not engaged in any new or novel departures from 43 U.S.C. § 912 or the related provisions of 43 U.S.C. § 913 or 23 U.S.C. § 316. The decision below is also supported by state law grounds. The

South Dakota Supreme Court's reasoning and result are supported by the language of the statute and its legislative history. The petition for certiorari should, thus, be denied.

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